NO. 41403-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ADALBERTO JIMINEZ MACIAS

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James E. Warme, Judge
The Honorable Jill Johanson, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORTIES

A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error by giving the jury a "reasonable doubt" instruction that the Washington Supreme Court forbade three years before trial.

2. Trial counsel was ineffective for failing to object to the forbidden "reasonable doubt" instruction.

3. The trial court erred by denying the motion to suppress evidence because the search warrant was not supported by probable cause to believe evidence of criminal activity would be found in the place searched.

4. The state failed to prove beyond a reasonable doubt that Adalberto Jiminez Macias constructively possessed cocaine or methamphetamine as required to find guilt for the crimes alleged in counts 6 and 7.

Issues Pertaining to Assignments of Error

1. Three years before trial, the Supreme Court in State v. Bennett[1] declared that henceforth, trial courts were to instruct jurors about the concepts of reasonable doubt and presumption of innocence by using only WPIC 4.01. Without objection, the court at Jiminez Macias' trial

[1] 161 Wn.2d 303, 165 P.3d 1241 (2007).

gave jurors the very instruction that triggered the Bennett decision. Did the trial court commit reversible error by disregarding the Supreme Court's supervisory declaration?

2. If not, did trial counsel deprive Jiminez Macias of his constitutional right to effective assistance by failing to object to the instruction?

3. Over the course of seven months, a multi-jurisdictional drug task force, with the help of three confidential informants (CIs), investigated an alleged "drug trafficking organization" that included Jiminez Macias and Jose Luis Ramirez. During that period, CI2 observed four ounces of cocaine at Ramirez's apartment; Jiminez Macias was observed entering the apartment one time using a key; and a different informant, CI1, bought cocaine from Jiminez Macias several times during a series of controlled buys. Agents obtained a search warrant for the apartment about three weeks after CI2 saw the cocaine and executed the warrant about a month after CI2's observation. During the search, officers found cocaine in a backpack and methamphetamine in a shirt pocket, both of which were located in the same bedroom of the two-bedroom apartment. Jiminez Macias moved to suppress this evidence. Did the trial court err by denying the motion, reasoning CI2's observation of the

cocaine supplied the requisite "nexus" between the criminal activity of the organization and the apartment?

4. Did the state fail to prove Jiminez Macias constructively possessed the cocaine and methamphetamine found in the apartment where dominion and control were not established?

B. STATEMENT OF THE CASE

1. Trial Evidence

During June 2009, Jiminez Macias became the target of a multi-jurisdictional drug enforcement unit called the Cowlitz/Wahkiakum Narcotics Task Force. RP 72, 226, 251-52, 340-42. The key member of the force was informant Jose Piedra Pineda, who signed a contract to identify drug dealers and buy drugs in "controlled buys" with money given to him by task force personnel. RP 77, 108-12, 180-82, 190-93, 245-47, 283-85, 341-45. The task force paid Piedra Pineda each time he successfully bought drugs. RP 185-87, 246-48, 284-85, 322-23.

Meanwhile, the federal office of Immigration and Customs Enforcement (ICE) was aware Piedra Pineda was an illegal alien from Mexico. RP 282-83. In fact, Piedra Pineda had been deported to Mexico in 1996 and again in 2002 or 2003. RP 307-09. He had used a variety of aliases and different dates of birth over the years in order to avoid paying

child support and to enter the United States. RP 282-83, 318-20, 332-34. Nevertheless, in exchange for Piedra Pineda's undercover work, ICE agents agreed to help him gain United States citizenship. RP 180-82, 193-95, 246-48, 282-83, 307-10.

The pertinent time period for this appeal was June and July 2009. On June 3, Piedra Pineda and task force officers, including Jason Hammer and Timothy Watson, arranged to buy an eighth of an ounce of cocaine (an "8 ball") for $200 from Ricardo Carbohol Santiago. RP 76-81, 226-32, 252-55, 286-88, 324-26, 345-47. Piedra Pineda did not know Jiminez Macias as the time. RP 182. At the agreed-upon time, Piedra Pineda went into Santiago's apartment and remained inside for 20 or 30 minutes. RP 77-78, 231. Santiago took Piedra Pineda's money, made a telephone call, and left. Jiminez Macias arrived soon thereafter with cocaine, which was given to Piedra Pineda. RP 78-81, 232, 254-56, 287-90, 326-27, 352-56, 366.

On the following day, June 4, task force members arranged for another controlled buy of an "8 ball," this time with Jiminez Macias rather than Santiago as the target. RP 81-85, 290-92. Jiminez Macias picked up Piedra Pineda, drove a short distance, and sold 3.6 grams of cocaine for $110. RP 85-90, 178-79, 258-59, 292-93. Under similar controlled

circumstances, Piedra Pineda bought 16 grams of cocaine from Jiminez Macias on June 5, RP 90-100, 175, 293-96, 8 grams of cocaine on June 9, RP 119-26, 176-78, 209-10, 262-64, 296-99, and an undisclosed amount of cocaine on June 19. RP 126-28, 211-12, 264-65, 303-07, 367-71.

On July 30 at about 8:30 a.m., Watson and other task force officers executed a search warrant at 3903 Ocean Beach Highway, apartment J4, located in Longview, Washington. RP 128-29, 213-14. This apartment drew Watson's attention because he had seen Jiminez Macias go to and from the apartment one time using a key to enter. RP 129. When Watson knocked, a sleepy Jose Ramirez answered the door. No one else was in the two-bedroom apartment. RP 128, 144, 214, 223-24. Watson first searched the closet of Bedroom 1 (B1). He found a "brick" of a white powder substance inside a backpack lying on the closet floor. RP 131, 146-50, 153-57, 171-73. In the pocket of a shirt hanging in the closet, Watson found a "crystalline substance" wrapped in plastic. RP 132, 153-54.

Watson also found two electronic scales with white powder residue on them. RP 132, 142-43. In addition, Watson found an automobile title for a 1990 Honda Accord[2] in Jiminez Macias's name, RP 167-68, and

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[2] According to the affidavit for search warrant, this would refer to

three receipts for international money transfers to Mexico, two in Jiminez Macias's name and one in Ramirez's name. RP 169-70. Watson photographed but did not collect a Social Security card bearing Jiminez Macias's name, a cell phone bill addressed to Jiminez Macias at 65 Alpha Drive, and a cable bill addressed to Ramirez at the apartment being searched. RP 217-18.

At the close of the state's case, the parties stipulated that the substances Piedra Pineda purchased from Jiminez Macias contained cocaine. As well, the parties agreed the brick found in the backpack contained cocaine and the crystalline substance found in the shirt pocket contained methamphetamine. RP 408-09; Ex. 38.

Based on these events, the state charged Jiminez Macias with five counts of delivery of cocaine, one count of possession of cocaine with intent to deliver, and one count of possession of methamphetamine. CP 129-32. The state also alleged the delivery of cocaine that occurred on June 4, as charged in count 2, occurred within 1,000 feet of the perimeter of the Mark Morris High School grounds. CP 130.

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the maroon Honda. CP 68. The address on the title was 65 Alpha Drive, Longview, Washington. RP 168.

After hearing the above evidence, jurors received a series of instructions from the trial court. Among them was instruction 4, the "reasonable doubt" instruction, which provided:

> The defendant has entered pleas of not guilty. This plea put in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> *A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.* Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him or her guilty. If on the other hand, you think there is a real possibility that he or she is not guilty, you must give him or her the benefit of the doubt and find him [*sic*] not guilty.

CP 139 (instruction 4) (emphasis added).

After hearing closing arguments, the jury found Jiminez Macias guilty of counts 1 through 4 (delivery of cocaine), not guilty of count 5 (delivery of cocaine on June 19), guilty of count 6 (possession of cocaine with intent to deliver) and guilty of count 7 (possession of methamphetamine). CP 163-70. The jury found Jiminez Macias did

deliver cocaine on June 4 within 1,000 feet of the Mark Morris High School grounds. CP 171.

The trial court imposed concurrent 36-month standard range sentences for each delivery count, a concurrent 36-month standard range sentence for possession of cocaine with intent to deliver, and a 12-month-plus-one-day standard range sentence for possession of methamphetamine. The court then added a 24-month school-ground sentencing enhancement for count 2. CP 190-203, RP 514-16.

2. Pretrial evidence –search warrant affidavit

On July 23, Officer Hammer submitted an affidavit for a search warrant to authorize a search of several residences and vehicles. CP 54-77. According to Hammer, the controlled buys described above were part of an ongoing investigation of a drug trafficking organization (DTO) that commenced in January 2009 and involved three confidential informants ("CI1, CI2, CI3"). CP 59-62. Beginning in mid-February and ending with the June 19 purchase discussed above, task force personnel engaged in 15 controlled buys of suspected methamphetamine and cocaine. CP 62-70.

Hammer identified seven "known members" of the DTO, including Jiminez Macias, Santiago, and Jose Luis Ramirez, a passenger in the silver Honda Accord Jiminez Macias drove during the June 19 controlled buy.

CP 62, 69-70. Hammer alleged Jiminez Macias used the same silver Accord when he sold cocaine to Piedra Pineda on June 9. CP 69. Another purported member of the DTO, Jesus Alejandro Mejia-Rosas ("Alex"), allegedly drove the same car during six controlled buys between April 17 and June 18, 2009. CP 62-67.

According to Hammer, one of the three undisclosed informants, CI2, identified Jiminez Macias as "a large quantity dealer or cocaine and methamphetamine who obtained the drugs from another DTO member nicknamed 'Nacho.'" CP 62, 73. CI2 reported that in early June, he overheard a conversation "where Adalberto Jiminez Macias was planning to purchase a half kilo of cocaine from 'Nacho' that was later delivered by [Santiago]." CP 71.

One of the residences identified in the search warrant affidavit was located at 3903 Ocean Beach Highway, apartment J4, in Longview, Washington. CP 58. Hammer alleged this apartment was Ramirez's residence. CP 73. Hammer wrote that at undisclosed times, task force colleagues frequently saw the silver Accord used during some of the deliveries parked at the apartment. CP 67, 73. C2 claimed to have seen four ounces of cocaine at the apartment within 48 hours of July 2, 2009. CP 71. On July 8, both Ramirez and Jiminez Macias were seen at separate

times entering the front door of apartment J4 using keys. On July 16, a maroon Honda Accord registered to Jiminez Macias was seen parked in the apartment J4 parking lot. Jiminez Macias used this vehicle during the June 3 and June 4 controlled deliveries. CP 72.

After considering all this information supplied by affiant Hammer, a magistrate authorized a search warrant for vehicles and residences, including apartment J4, 3903 Ocean Beach Highway. CP 75-77. As explained above, the resulting search of apartment 4 yielded a quantity of cocaine and methamphetamine.

Jiminez Macias moved to suppress this evidence. He maintained the information contained in Hammer's affidavit did not establish probable cause to believe evidence of a crime would be found in the apartment. CP 14-49.

The only "evidence" considered by the trial court at the motion hearing was the affidavit. After the parties presented their arguments, the trial court denied the motion to suppress. The court found the information in the affidavit sufficient to establish the existence of a drug trafficking organization whose members periodically went to apartment J4. RP 35. The court found the CI2's observation of cocaine inside the apartment sufficiently linked the apartment to the DTO's activity. Without proof of

the DTO, the court reasoned, the presence of the cocaine in the apartment a month earlier would not have been enough to find probable cause. RP 35-36.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY GIVING THE "CASTLE INSTRUCTION" RATHER THAN MANDATORY PATTERN JURY INSTRUCTION 4.01.

In Washington, pattern jury instruction 4.01 is the exclusive vehicle by which to explain the constitutional concepts of reasonable doubt and the presumption of innocence to jurors in criminal trials. The Supreme Court declared in August 2007 that trial courts must use WPIC 4.01 to the exclusion of any modified versions of a "reasonable doubt" instruction. State v. Bennett, 161 Wn.2d 303, 318, 165 Wn.2d 1241 (2007). In Jiminez Macias' August 2010 trial, the court gave a reasonable doubt alternative instruction that was nearly identical to the one at issue in Bennett. The trial court's disregard for the Supreme Court's edict requires reversal of Jiminez Macias' convictions.

a. The trial court may not disregard a supervisory command from the Supreme Court.

The instruction the trial court gave was essentially the same as the so-called "Castle instruction," named after the first Washington case in which it appeared, State v. Castle, 86 Wn. App. 48, 935 P.2d 656, review

denied, 133 Wn.2d 1014 (1997).[3] Division One of the Court of Appeals upheld the instruction, as did Division Three in State v. Hunt, 128 Wn. App. 535, 116 P.3d 450 (2005), and this Court in State v. Bennett, 131 Wn. App. 319, 328, 126 P.3d 836 (2006).[4]

In its review of this Court's decision, the Supreme Court grudgingly acknowledged the Castle instruction satisfied constitutional due process requirements. Bennett, 161 Wn.2d at 315. Recognizing the importance of the instruction, the Court stopped short, however, of endorsing its use:

> The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence. While the Castle instruction certainly has its supporters, we find that many who have

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[3] The sentences of instruction 4 that have been italicized in this brief did not appear in the instruction before the court in Castle. 86 Wn. App. at 52-53. The Washington Pattern Jury Instruction Committee endorsed the instruction, finding it provided an accurate, easily understandable statement of the law. The Committee encouraged its use – with the italicized language included – by adding it to the pattern instructions as WPIC 4.01A. 11 Washington Practice, Washington Pattern Jury Instructions, WPIC 4.01A cmt. at 24 (2d ed. 1998 Pocket Part).

[4] The instruction given in Bennett included the italicized sentences. 161 Wn.2d at 309.

considered the issues have been, like this court, less than enthusiastic about the instruction.

Bennett, 161 Wn.2d at 315-16.

Continuing, the Court called the presumption of innocence "too fundamental, too central to the core of the foundation of our justice system not to *require adherence to* a clear, simple, accepted, and uniform instruction." Bennett, 161 Wn.2d at 318 (emphasis added). Exercising its inherent supervisory power over lower Washington courts, the Court unambiguously commanded that "[t]rial courts are instructed to use the WPIC 4.01[5] instruction to inform the jury of the government's burden to

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[5] WPIC 4.01 reads:

> [The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]

prove every element of the charged crime beyond a reasonable doubt." 161 Wn.2d at 318.

The state Supreme Court's orders, supervisory directives, and holdings with respect to state law bind lower Washington courts. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); see State v. Strauss, 119 Wn.2d 401, 413, 832 P.2d 78 (1992) ("An individual trial court is not free to determine which appellate court orders, if any, it chooses to follow. If a trial court were free to ignore such orders, total chaos would result in the court system.").[6]

This Court made this binding authority rule clear in State v. Lundy.[7] The issue there was whether the trial court erred by disregarding Bennett and using a modified reasonable doubt instruction rather than WPIC 4.01.[8] This Court held, "Because our Supreme Court has

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[6] Although perhaps not qualifying as "total chaos," the trial courts' disregard for the Supreme Court's holdings in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982), and their progeny, provides a live example of the systematic heartburn and delay that results from lower courts' ignorance of or refusal to follow binding precedent.

[7] __ Wn. App. __, __ P.3d __, 2011 WL 3110525 (No. 40448-6, 7/26/2011).

[8] The instruction in Lundy provided:

> A defendant is presumed innocent. This presumption

unambiguously directed trial courts to use *only* WPIC 4.01, the trial court erred by modifying the instruction." Lundy, 2011 WL 3110525, at *4.

This Court's holding is consistent with Division One's decision in State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009). In Castillo, the trial court gave a different modified version of a reasonable doubt instruction. 150 Wn. App. at 470. Chastising the trial judge court and counsel for ignoring Bennett, Division One reversed a first degree child rape conviction and remanded for retrial, emphasizing "trial courts are to use ***only*** WPIC 4.01 as the reasonable doubt instruction 'until a better

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> continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt.
>
> Each crime charged by the State includes one or more elements which are explained in a subsequent instruction. The State has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Lundy, 2011 WL 3110525, at *3.

instruction is approved.'" 150 Wn. App. at 472-75 (quoting Bennett, 161 Wn.2d at 318).

Just as in Lundy and Castillo, the trial court in Jiminez Macias' trial ignored the Supreme Court's Bennett command. Therefore, just as in those two cases, this Court should find the trial court erred by not giving WPIC 4.01.

b. Jiminez Macias did not waive his challenge to the erroneous instruction by failing to object.

Jiminez Macias' counsel did not propose the Castle instruction. He therefore did not invite the trial court's error. But, contrary to trial counsel in Castillo, Jiminez Macias' counsel did not object to the instruction. In similar circumstances, RAP 2.5(a) typically precludes review absent a timely objection to a jury instruction. State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

There are two reasons why this Court should reach the issue here. First, Lundy did not object to the modified instruction, but this Court nevertheless reached the merits of the issue. Lundy, 2011 WL 3110525 *3.

Second, Jiminez Macias' appeal is different from the typical challenge to an instruction. His challenge is to the trial court's disregard of the Bennett Court's supervisory command. Finding waiver here would

frustrate the Supreme Court's purpose of ensuring uniform reasonable doubt instructions in all criminal trials in Washington. If a party could waive application of WPIC 4.01 in favor of a different instruction, the Supreme Court's "inherent supervisory power" would be unenforceable and illusory. Unless and until the Supreme Court overrules Bennett, this Court and all trial courts are "duty-bound" to apply its rule. See Green v. Normandy Park, 137 Wn. App. 665, 691-92, 151 P.3d 1038 (2007) ("[E]ven if we believed Weld [v. Bjork, 75 Wn.2d 410, 412, 451 P.2d 675 (1969)] to be incorrectly decided, we would not be free to ignore its applicability. The Weld decision has not been overruled in any subsequent Supreme Court opinion. It, therefore, remains a valid statement of Washington law as pronounced by our Supreme Court. Accordingly, we are duty-bound to apply the Weld rule, whatever its underpinnings may have been."), review denied, 163 Wn.2d 1003 (2008).

Finally, RAP 2.5(a) "never operates as an absolute bar to review." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). This Court may review an issue raised for the first time on appeal in the interest of justice. RAP 1.2(a); State v. Lee, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999). For these reasons, this Court should reach the issue and reverse Jiminez Macias' convictions.

c. Disregard of a supervisory command is not subject to harmless error rules.

Although the Lundy and Castillo courts agreed the trial court erred, the disagreed on the remedy. Castillo reversed and remanded for a new trial, rejecting the state's argument affirmance was proper because the Supreme Court affirmed Bennett's conviction. 150 Wn. App. at 472-75.

This Court, however, affirmed Lundy's conviction. Noting Bennett was silent on the point, the Lundy Court applied a constitutional harmless error analysis. This Court held the modified reasonable doubt instruction highlighted the presumption of innocence, properly allocated the burden of proof to the state, and specified the accused had no burden of proving a reasonable doubt exists. This Court thus concluded beyond a reasonable doubt the outcome of the trial would have been the same without the error. Lundy, 2011 WL 3110525, at *4-*5.

Jiminez Macias urges this Court not to follow this portion of Lundy. The Lundy Court treated the error as any other instructional error rather than as an express disregard for the Supreme Court's supervisory authority. Whatever effect the error may have on the trial at issue, such lower court indifference to judicial authority endangers the hierarchical framework of Washington's judicial system. After all, Supreme Court opinions are binding on all lower courts. Gore, 101 Wn.2d at 487.

The error here resembles structural error in that it is impossible to measure the value of systemic stability generally and uniformity in this area of the law specifically. See Sullivan v. Louisiana, 508 U.S. 275, 282, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (erroneous reasonable doubt instruction implicates both Fifth and Sixth amendments; deprivation of Sixth Amendment jury trial right, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"); see also United States v. Gonzalez-Lopez, 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (erroneous deprivation of the right to counsel of choice is structural error because consequences are not quantifiable or determinate).

Further, by applying harmless error analysis, this Court invites judges and parties who dislike WPIC 4.01 to experiment with different ways to explain the fundamental concepts of reasonable doubt and the presumption of innocence. Given the existence of Bennett, such tinkering will result in a flood of challenges to non-pattern reasonable doubt instructions that will force appellate courts in every instance to determine whether a particular variation on the reasonable doubt theme results in prejudice. Such a consequence promotes neither respect for the law nor judicial efficiency.

Finally, the practical effect of this portion of Lundy is to excuse a lower court's failure to satisfy a mandatory requirement. When stated this way, the illogic of applying harmless error becomes obvious. For all these reasons, Jiminez Macias asks this Court to reject Lundy and hold the failure to give WPIC 4.01 is reversible error.

d. If the issue is waived, trial counsel was ineffective for failing to object to the inadequate Castle instruction.

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. In re Detention of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009).

Finally, only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").

i. Defense counsel's performance was deficient.

The Bennett Court observed that merely because the Castle instruction meets minimum due process requirements "does not mean that it is a good or even desirable instruction." 161 Wn.2d at 315. The Court identified two problems with the instruction. "First, the instruction emphasizes what the State need not prove instead of describing the State's burden of proof. Second, ever reasonable doubt is a possible doubt." 161 Wn.2d at 317.

Despite these inadequacies, Jiminez Macias' counsel accepted the instruction. Counsel's failure to object is particularly concerning because Jiminez Macias relied on a general denial defense, which necessarily emphasizes the state's heavy burden of proof.

In fact, counsel argued the evidence found at the Ocean Beach apartment "actually creates a reasonable doubt." RP 464. Counsel reminded jurors they "talked during voir dire about making an effort to

make these presumptions of innocence and guilty beyond a reasonable doubt work." RP 471. Counsel also argued "there is no higher burden of proof known to mankind much less the law than proof beyond a reasonable doubt." RP 474.

Failing to object to what the Bennett Court concluded was a substandard instruction falls below an objective level of competence. Had counsel properly proposed WPIC 4.01 and brought Bennett to the trial court's attention, the jury would not have been told that "absolute certainty" or "proof that overcomes every possible doubt" is not required to sustain a guilty verdict.

Such language is harmful to the defense. See Jones v. State, 656 So.2d 489, 490 (Fla. Ct. App. 1995) (finding trial judge's extemporaneous pretrial instruction that certitude was not required to satisfy reasonable doubt standard was fundamental error because judge later failed to give proper instructions on reasonable doubt and presumption of innocence; extemporaneous instruction "was tantamount to telling the jury that it could base a guilty verdict on a probability of guilt as long as it was remarkably strong probability."); cf., State v. Wilson, 686 So.2d 569, 570 (Fla. 1996) (trial judge who gave similar extemporaneous pretrial instruction did not commit error because judge gave standard reasonable

doubt instruction at close of evidence and told jury it must follow standard instructions).[9]

Furthermore, the Bennett Court found the Castle instruction "problematic" three years before Jiminez Macias' trial. Bennett, 161 Wn.2d at 317. By failing to object to this dubious instruction, Jiminez Macias' trial counsel failed to research relevant law. For these reasons, counsel's conduct was deficient. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Kyllo is instructive on this point. Defense counsel proposed a pattern "act on appearances" self-defense instruction that earlier cases had found was incorrect. Kyllo, 166 Wn.2d at 867-68. The Court found with proper research, counsel should have determined the instruction was no longer good law. Failing to research or apply this relevant law, the Court held, was deficient performance. Kyllo, 166 Wn.2d at 868.

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[9] The operative language of each extemporaneous instruction was that "the State does not have to convince you to an absolute certainty of the defendant's guilt." Wilson, 686 So.2d at 570; Jones, 656 So.2d at 490. Similarly, the jury in Jiminez Macias' trial was told, "There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt." CP 139 (instruction 4).

By overlooking Bennett, Jiminez Macias' counsel was similarly remiss. Further, there could be no reasonable tactical advantage gained by allowing jurors to be instructed they could find guilt based merely on a strong probability rather than a certainty. Counsel's failure to object to the Castle instruction therefore was deficient performance.

ii. Counsel's deficient performance prejudiced Jiminez Macias.

There is a reasonable probability that, but for counsel's failure to object, the outcome of trial would have been different. The state's case hinged on the testimony of an informant who was in the United States illegally, who used several different names, and who was paid only if he delivered a controlled substance to his supervising task force agent. There was no forensic evidence linking Jiminez Macias to any of the baggies of cocaine or the baggie of methamphetamine. The state failed to account for the prerecorded money used to buy the cocaine, and it presented no evidence from Jiminez Macias' residence or automobiles.

Had trial counsel proposed WPIC 4.01, jurors would have been told what a reasonable doubt was, rather than what it was not. Jurors would have learned reasonable doubt is "such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." WPIC 4.01. Defense counsel's

failure to advocate for this proper admonition resulted in prejudice. This Court should find Jiminez Macias was denied his right to effective assistance of counsel. His convictions should be reversed, and the cause remanded for a new trial.

2. THE TRIAL COURT ERRED BY FINDING THE AFFIDAVIT CONTAINED INFORMATION SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO BELIEVE DRUG-RELATED EVIDENCE WOULD BE FOUND IN APARTMENT J4.

A search warrant may not issue unless it is supported by probable cause to believe there is a nexus between the asserted criminal activity and the place to be searched. Task force officers failed to establish that nexus here.

a. General legal principles

The Fourth Amendment[10] and Const. art. I, § 7[11] require a search warrant be issued only upon a showing of probable cause based on facts sufficient to establish a reasonable inference the defendant is probably involved in criminal activity and evidence of the crime will be found at a

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[10] The Fourth Amendment to the United States Constitution provides, in pertinent part, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[11] Const. art. I, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

specified location. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Courts look for a nexus between the criminal activity or contraband and the targeted location. State v. Nusbaum, 126 Wn. App. 160, 166, 107 P.3d 768 (2005). Without a sufficient factual basis to support a reasonable conclusion that evidence of illegal activity will likely be found at the place to be searched, the required nexus is not established as a matter of law. State v. Thein, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). Probable cause must exist at the time the magistrate issues the warrant. State v. Goble, 88 Wn. App. 503, 508, 511, 945 P.2d 263 (1997). Finally, a search warrant targeting more than one person or place to be searched must contain sufficient probable cause to warrant its issuance as to each person or place named. Greenstreet v. County of San Bernardino, 41 F.3d 1306, 1309 (9th Cir. 1994).

At a suppression hearing the trial court acts in an appellate-like capacity. The trial court's assessment of probable cause is a legal conclusion this Court reviews de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); State v. Emery, 161 Wn. App. 172, __, 253 P.3d 413, 430 ¶ 62,(2011). The question is whether the affidavit on its face contains sufficient facts for a finding of probable cause. State v.

Perez, 92 Wn. App. 1, 4, 963 P.2d 881 (1998), review denied, 137 Wn.2d 1035 (1999).

b. Information contained in the affidavit for search warrant failed to establish probable cause to believe evidence tending to show drug trafficking would be found at apartment J4.

In broadly pertinent part, the facts contained in Hammer's affidavit established that (1) Jose Ramirez listed his residence as apartment J4, CP 67; (2) Ramirez was referred to as a methamphetamine buyer, and Jiminez Macias as a mid-level cocaine and methamphetamine dealer, in Hammer's DTO hierarchy summary, CP 62, 70; (3) the silver Honda was used in deliveries that occurred between mid-April and June 19, 2009, CP 63-66 (by Alex), CP 69-71 (by Jiminez Macias); (4) Ramirez became the registered owner of the silver Honda, which officers began to see park regularly at J4, shortly after June 18, 2009, CP 67; (5) Ramirez was a passenger in the silver Honda when Jiminez Macias sold cocaine to CI1 on June 19; (6) on or about July 1, 2009, CI2 observed about four ounces of cocaine at apartment J4, CP 71; (7) on July 8, 2009, Watson observed Ramirez and Jiminez Macias separately enter the front door of apartment J4 using a key; and (8) on July 16, Hammer observed Jiminez Macias' maroon Honda parked at apartment J4, CP 65, 67-68, 72.

Reviewing these facts de novo, this Court should conclude the trial court erred because there was not a sufficient nexus between the DTO's drug dealing and apartment J4.

Ramirez lived at apartment J4. Watson's observation of him entering the apartment with a key is thus unremarkable. Ramirez was at most a bit player in the organization; he never participated in a controlled buy and only once was seen buying methamphetamine. Because the amount of methamphetamine purchased was not disclosed, it was just as likely he bought the drug for his own consumption as for sale to others. Although Ramirez accompanied Jiminez Macias in the silver Honda Accord at the June 19 controlled buy, he was the registered owner of the vehicle by then. That transferred ownership likely explained not only his presence during the transaction but also why task force agents began to see the Accord parked at apartment J4. Finally, Ramirez played no role in the transaction and did not look familiar to Piedra Pineda (CI1).

As for Jiminez Macias, Hammer included no information to support a reasonable suspicion that apartment J4 served as a storage space for cocaine. For example, CI2 disclosed that J. Angel Orozco, who sold methamphetamine to Alex and Ramirez on July 2 at his own residence at 225 Carolina Street, stored his drugs next door, at 229 Carolina Street. CP

71-72. Neither CI2 nor anyone else provided similar evidence regarding apartment J4.

CI2 did claim to observe four ounces of cocaine at apartment J4 on or about July 1, 2009, but provided no context for the sighting, such as an explanation of why s/he was inside the apartment, where s/he observed it in the apartment, or who else was inside at the time. Moreover, it was not until one week later that Watson saw Jiminez Macias open the front door of J4 with a key. In addition, the sighting occurred two weeks after the final controlled buy on June 19, and a month after CI2 overheard a conversation that Jiminez Macias had bought a large quantity of cocaine from "Nacho." Furthermore, there was no information in the affidavit linking Nacho to apartment J4.

Conspicuously absent from Hammer's affidavit is evidence showing Jiminez Macias ever left from or returned to apartment J4 before and/or after he sold cocaine to Piedra Pineda. Such evidence would have suggested he was storing his cocaine there. See State v. G.M.V., 135 Wn. App. 366, 372, 144 P.3d 358 (2006) ("[t]he warrant was to search the place [the boyfriend] left from and returned to before and after he sold drugs. This was a nexus that established probable cause that [the boyfriend] had drugs in the house."), review denied, 160 Wn.2d 1024

(2007); see also State v. Maddox, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004) (information in affidavit, including that controlled methamphetamine buy took place at defendant's residence only three days before warrant issued, established probable cause to search defendant's residence); State v. Perez, 92 Wn. App. at 6-7 (police established probable cause to believe there was nexus between drug deals and suspected "safe house" by providing information that shortly after informant and "Felix" arranged drug transaction, Felix drove directly to "safe house" before and after transaction).

In contrast with these cases is Goble. The court held there was no probable cause to issue a search warrant for the defendant's residence because the magistrate

> had no information that Goble had previously dealt drugs out of his house, rather than out of a different place (for example, a tavern, his car, or a public park). He had no information that Goble had previously stored drugs at his house, rather than in some other place (for example, in his car, at his place of employment, at a friend's house, or buried in the woods). He had no information that Goble had previously transported drugs from P.O. Box 338 to the house, or that Goble had previously said he intended to do so.

Goble, 88 Wn. App. at 512.

Jiminez Macias' situation is like Goble and unlike the other cases. There was no showing he used apartment J4 to store cocaine, cash, packaging materials, or any other tools of the drug trafficking trade.

Probable was thus lacking. This Court should find the trial court erred by failing to grant the motion to suppress.

c. Innocuous facts do not contribute to a finding of probable cause.

Furthermore, to the extent the affidavit set forth merely innocent or innocuous facts, the trial court erred by finding probable cause. An example is Jiminez Macias' single entry into apartment J4 with a key at an unspecified time on July 6, a day when no controlled buys occurred. The warrant does not state Jiminez Macias carried anything into or out of the apartment, looked around suspiciously or otherwise acted furtively before entering the apartment, or was accompanied by an informant or suspect when he enter entered or left from J4. Nor is it alleged that an odor of controlled substances emanated from apartment J4 at any time during the task force investigation. The same is true regarding the single sighting of Jiminez Macias' maroon Accord parked at apartment J4 on July 16, as well as the "frequent" sightings of "another vehicle registered to" Jiminez Macias near apartment J4. CP 73.

This is important. When it comes to probable cause, "[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous." United States v. Lee, 73 F.3d 1034, 1039 (10th Cir 1996), overruled on other grounds, United States v. Holt,

264 F.3d 1215, 1226 n.6 (10th Cir. 2001). Probable cause does not arise from innocuous facts or when there are otherwise plausible reasons for the activity in question. State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994).

State v. Kennedy[12] illustrates this point. A confidential informant told police the defendant was a large-scale drug dealer who cooked drugs and was plying his craft in Mason County. At issue was whether there were other facts sufficient to corroborate the informant's tip and support a finding of probable cause to search a rental cottage the defendant occupied. 72 Wn. App. at 245. Setting forth the additional facts, this Court held:

> Under different circumstances, mere registration while driving a Granada, license KYV 189, and the refusal of maid service at the cottage, without more, would be innocuous facts insufficient to corroborate the informant's tip. However, here such facts are coupled with other suspicious activities: the presence of several cars outside the cottage; different people answering the maid's knock at the door to refuse service; the presence of a strong chemical odor emanating from the cottage and from the linen delivered to the office; and the maid's observation that those who answered the door appeared "stoned" on drugs. These activities were shrouded in secrecy by the constantly drawn shades. Not only are these suspicious activities, particularly at a resort where there are outdoor recreational activities, they are probative indications of criminal activity along the lines suggested by the informant.

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12 72 Wn. App. 244, 250, 864 P.2d 410 (1993).

Kennedy, 72 Wn. App. at 250; see Neth, 165 Wn.2d at 185 ("absent some other evidence of illicit activity, the mere possession of a few empty, unused plastic baggies in a coat pocket does not constitute probable cause to search an automobile, even when combined with nervousness, inconsistent statements, and a large sum of money in the car. Baggies are capable of use for lawful as well as unlawful purposes.").

As applied here, affiant Hammer described no "suspicious" facts with respect to apartment J4. For example, there were no rebuffed attempts by apartment staff to do maintenance in the apartment, no heavy traffic in and out of the apartment, no drawn blinds day and night, and no unusual activity around the outside of the apartment. Quite simply, the innocuous activities set forth in the affidavit stand alone, without support from activities that would suggest the existence of criminal activity inside the apartment. For this reason as well, the trial court erred by finding probable cause.

d. The informant's observation of cocaine was too stale to be considered by the trial court.

Finally, the trial court erred by considering CI2's statement that s/he observed four ounces of cocaine one month before execution of the warrant because the information was stale. Information contained in an affidavit must support the reasonable probability that evidence of criminal

activity existed at the targeted premises at or about the time the warrant was issued. State v. Higby, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980).

Duration is thus a significant factor in the staleness equation. See State v. Riley, 34 Wn. App. 529, 535, 663 P.2d 145 (1983) (where affidavit stated informant saw stolen computer at accused's residence four days before warrant served, information was not stale); State v. Hett, 31 Wn. App. 849, 852-53, 644 P.2d 1187 (1982) (information in affidavit found not stale where informant stated he observed sale of marijuana by accused to third person just three days before execution of the warrant, and informant arranged with accused to meet for sale of marijuana on day affidavit was signed and warrant issued), review denied, 97 Wn.2d 1027 (1982).

Duration alone, however, is not dispositive; the nature of the items sought must be considered when determining whether the items would remain at the place to be searched. State v. Young, 62 Wn. App. 895, 903, 802 P.2d 829 (1991). When the target of a search is something evanescent like a controlled substance, which is meant to be consumed, the information contained in the search warrant affidavit is more likely to be found stale than when the sought-after evidence is a business record or an item with reusable value, such as a firearm, because it is reasonable to

believe the evidence will remain at the place to be searched for a longer time period.

For example, the Supreme Court held a three-month delay between completion of real estate transactions on which warrants were based and the searches did not defeat a probable cause finding because the records sought were prepared in the ordinary course of the accused's business, making it "eminently reasonable" to believe such records would remain. Andresen v. Maryland, 427 U.S. 463, 478, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). Similarly, in a case involving the seizure of digital images depicting child pornography, the court held that while "[d]igital images may be saved for extended periods of time and viewed or copied multiple times without changing their inherent properties[,] . . . drugs are usually consumed or distributed within a relatively short period of time." State v. Garbaccio, 151 Wn. App. 716, 729, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010); see State v. Hall, 53 Wn. App. 296, 300, 766 P.2d 512 (1989) (two-month gap between informant's presence inside defendant's residence and execution of warrant not too long where informant disclosed established marijuana grow operation in residence), review denied, 112 Wn.2d 1016 (1989).

Search warrant affidavits should be read in a commonsense manner to determine whether they establish probable cause. Neth, 165 Wn.2d at 182. Read this way, it was not reasonably likely that either the same four ounces of cocaine CI2 observed, a portion of that amount, or other drugs or evidence of drug dealing would be present at apartment J4 when the warrant was executed one month later. Instead, more evidence was necessary, such as frequent sightings of DTO members other than Ramirez -- especially Jiminez Macias -- going in and out of the apartment, or clandestine behavior by Ramirez, or a link between the apartment and the controlled buys, to establish probable cause. Absent such supporting proof, the trial court erred by relying on CI2's stale observation. Without that evidence, the affidavit fails to support the warrant.

For all these reasons, the trial court erred by denying Jiminez Macias' motion to suppress the evidence found at apartment J4. That evidence comprised the state's entire case regarding counts 6 and 7. This Court should therefore reverse the trial court's denial and remand the cause for dismissal of counts 6 and 7 with prejudice.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT JIMINEZ MACIAS CONSTRUCTIVELY POSSESSED EITHER THE COCAINE OR THE METHAMPHETAMINE FOUND AT RAMIREZ'S APARTMENT.

Unlawful possession is an element of possession of cocaine with intent to deliver (PWI). RCW 69.50.401(1); State v. Goodman, 150 Wn.2d 774, 782, 83 P.3d 410 (2004). Possession is an element of possession of methamphetamine. RCW 69.50.4013; State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005). Possession may be actual or constructive. State v. Hathaway, 161 Wn. App. 634, __, 251 P.3d 253, 260 ¶ 16 (2011). "Actual possession" means that the goods were in the defendant's physical custody. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Constructive possession, in contrast, means the accused has dominion or control over the property itself or the premises where the property is discovered. State v. Turner, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000). This Court must review the totality of the circumstances to determine whether dominion and control exist. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Constructive possession need not be exclusive. State v. Nyegaard, 154 Wn. App. 641, 648, 226 P.3d 783 (2010). Temporary residence,

personal possessions on the premises, or knowledge of the presence of contraband, without more, are insufficient to show dominion and control. State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983).

The question here is whether the state presented sufficient evidence to establish Jiminez Macias had dominion or control over "bedroom 1," including the closet, where Watson found the "brick" of cocaine and methamphetamine. The state presented evidence that Jiminez Macias entered apartment J4 once with a key. Further, the state relied on Watson's discovery of Jiminez Macias' Social Security card, a phone bill and vehicle title to the maroon Honda in his name, a pay stub in his wife's name, his wife's birth certificate, his wife's necklace, his daughter's Nintendo game, and clothing belonging to his children, all found in a dresser drawer in bedroom 1. RP 132-40, 167-70, 216-18, 410-13; Exs. 20, 21, 25, 27.

None of these documents, however, were addressed to Jiminez Macias or his wife at the apartment J4 address. Instead, the documents with addresses referred to the Alpha Drive residence where Jiminez Macias lived with his wife and three children. RP 410. Jiminez Macias also did not have a key to apartment J4 in his possession when he was arrested at the Alpha Drive apartment on July 30. RP 215-16.

There was one document addressed to J4, however – a cable bill in Ramirez's name. RP 171, 218-19, 222-23. When task force officers served the search warrant, a sleepy Ramirez was the only person at the apartment. RP 129-30. Watson said he believed Ramirez was the lessee of the apartment. RP 143-44. There was no evidence indicating Jiminez Macias has any interest in the apartment.

Reviewing the circumstances of other Washington cases leads to a conclusion the state fell short of meeting its burden to prove constructive possession. State v. Knapstad[13] is analogous in this regard. Douglas Knapstad and his brother, Gary, were jointly charged with possessing 160 grams of marijuana found in a box in the attic of Gary's home. Knapstad, 107 Wn.2d at 347. The state presented the following evidence to establish Douglas possessed the drug: (1) drug paraphernalia was found in common areas of the house; (2) a several-months-old credit card receipt in Douglas's name, but referring to a different address, was found in a dresser drawer in one of the bedrooms; (3) police found a traffic ticket – which also referred to a different address -- that had been issued to Douglas about two weeks before the search; and (4) an officer saw Douglas' vehicle

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13 107 Wn.2d 346, 729 P.2d 48 (1986).

parked at Gary's residence three times before the search, each time after 2 a.m. Knapstad, 107 Wn.2d at 348.

The trial court granted Douglas' pretrial motion to dismiss, finding the state failed to present sufficient evidence showing Douglas owned or had knowledge, control, or possession of the marijuana, or that he was a resident of the searched home. Knapstad, 107 Wn.2d at 348. The Supreme Court affirmed, stating emphatically that "[i]t is clear that this evidence is insufficient as a matter of law to prove that Knapstad actually or constructively possessed marijuana." Knapstad, 107 Wn.2d at 349.

As in Knapstad, this Court should give little weight to documents found in Jiminez Macias' name as well as his wife's name because none referred to apartment J4. Cf. State v. Bradford, 60 Wn. App. 857, 864-65, 808 P.2d 174 (1991) (rejecting appellant's challenge to proof of constructive possession of cocaine found in kitchen, court emphasizes that "a visitor or temporary resident of a house does not receive the premises' utility bills in his name" and that while "even his reception of mail at the address might not necessarily be sufficient to show dominion and control, a casual visitor has no responsibility for the payment of the telephone bill, as evidenced by the bill in Bradford's name."), review denied, 117 Wn.2d 1003 (1991); State v. Dobyns, 55 Wn. App. 609, 616, 779 P.2d 746 (1989)

(evidence sufficient to show appellant had dominion and control of Phinney Avenue residence and therefore marijuana grow operation therein; bill found on bulletin board had been mailed to Dobyns at Phinney Avenue address; one of Dobyns' business cards listed two phone numbers, one of which was phone number for Phinney Avenue home and phone company record revealed number was billed to Dobyns), review denied, 113 Wn.2d 1029 (1989).

Similarly, the presence of personal items in a searched home, or temporary residence in that home, is not sufficient to establish dominion and control. Hystad, 36 Wn. App. at 49. The latter point diminishes whatever significance can be attached to Watson's single observation of Jiminez Macias' entry into apartment J4.

Finally, there is the matter of the clothing in the closets in both bedroom 1 and bedroom 2, which Watson also searched. Of significance -- to Watson, anyway -- was that the pants found in bedroom 1 had a 30-inch inseam and 34-inch or 36-inch waist, while those in bedroom 2 had a 32-inch inseam and 34-inch or 36-inch waist. RP 223. Watson checked the pants Ramirez was wearing, which had a 32-inch inseam.

This evidence proves nothing. Jurors were not told Jiminez Macias' pants size at the time of the search or trial. There was no

demonstration done to see how size 30 versus 32 pants fit on Jiminez Macias. Nor was Jiminez Macias' height made part of the record. This futile attempt to link Jiminez Macias to the items found in bedroom 1 illustrates the weakness of the state's evidence with respect to possession.[14]

For these reasons, Jiminez Macias requests this Court to find the state failed to prove beyond a reasonable doubt that he constructively

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[14] In closing argument, the prosecutor discussed the evidence Watson found in bedroom 1, including the clothing:

> [Watson] found some other things in that bedroom. And just to get it out of the way, he found some pants. He found a couple of shirts, found a pair of pants. The inseam on those pants, the inseam was 30, and he went and there was a guy in the apartment who wore a 32. Detective Watson said he checked, checked the other bedroom, those were Size 32. The ones in Bedroom 1 are Size 30, different pants size. So I think that that's important to start with.

RP 458.

Later, the prosecutor summed up his first argument with this:

> And that if you look at the evidence that's in [apartment J4], the evidence that was recovered at the scene, the wire transfers indicating substantial amounts of money being sent to Mexico in the name of Adalberto Jimenez-Macias, the pants that don't fit the guy that's found in the apartment and the identity information, the car title to the vehicle for the first two buys, the scales, 26 grams of meth and half a kilo of cocaine which again we're paying for, it's about $15,000, the evidence suggests that the defendant is guilty. And that's the verdict that I'm going to ask you to return.

RP 462.

possessed either the cocaine found in the backpack in apartment J4 or the methamphetamine found in the pocket of the shirt hanging in the closet of bedroom 1 in apartment J4.

D. CONCLUSION

The convictions for count 6 (PWI cocaine) and count 7 (possession of methamphetamine) should be reversed and remanded for dismissal with prejudice because the trial court erred by denying Jiminez Macias' motion to suppress evidence. Alternatively, those convictions should be reversed and remanded for dismissal with prejudice because the state failed to prove constructive possession beyond a reasonable doubt. Alternatively as to counts 6 and 7, and as to the convictions for counts 1 through 5, this Court should reverse and remand for a new trial because the trial court disregarded a Supreme Court supervisory declaration by using an incorrect "reasonable doubt" instruction.

DATED this 20 day of July, 2010.

Respectfully submitted,

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No. 41403-1-II

Certificate of Service by Mail

On July 28, 2011, I deposited in the mails of the United States of America, A properly stamped and addressed envelope directed to:

Susan Irene Baur
Cowlitz Co. Prosecutor's Office
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Adalberto Jiminez 344105
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Containing the brief of appellant, re Macia Jiminez Cause No. 41403-1-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Office Manager
Nielsen, Broman & Koch

7-28-11
Date
Done in Seattle, Washington